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IN THE

Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals gave the Federal Tort Claims Act's customs and tax exception, 28 U.S.C. 2680(c), unintended breadth when it held that the exception's detention of property clause barred petitioner's claim for the loss of his property by federal prison officials. As petitioner's opening brief explains, the exception's text establishes, and its legislative history and underlying purpose confirm, that Congress intended to preserve sovereign immunity for only claims arising out of the detention of property by customs, tax, and other law enforcement officers *acting in a customs or tax capacity*. Respondents labor to hijack these indicators of congressional intent. In the end, however, respondents cannot support their expansive and acontextual construction of the exception because their interpretation rests on a selective reading of the statute, the legislative record, and this Court's relevant precedents. In contrast, a thorough ex-

amination of those interpretive guides reveals that Congress intended § 2680(c) to bar suits arising out of law enforcement officers' attempts to enforce the revenue laws and that the provision's detention of property clause was intended to preserve sovereign immunity for property torts committed only by law enforcement officers doing the same. The court of appeals erred in holding otherwise and reversal is warranted.

I. RESPONDENTS' EXPANSIVE READING OF § 2680(C)'S DETENTION CLAUSE IS INCONSISTENT WITH THIS COURT'S PLAIN TEXT APPROACH TO STATUTORY INTERPRETATION

1. The focus on revenue collection in § 2680(c)'s text is unmistakable. In addition to preserving sovereign immunity for claims arising out of "the detention of goods" and "merchandise" "by any officer of customs or excise," the statute also preserves sovereign immunity for claims arising out of "the assessment or collection of any tax or customs duty." 28 U.S.C. 2680(c). Notwithstanding these strong contextual cues as to the proper reach of the detention clause's residual "any other law enforcement officer" phrase, respondents assert that the phrase "plain[ly]," "unambiguously," and "straightforward[ly]" preserves the United States' sovereign immunity for property torts arising out of detentions of property by all law enforcement officers regardless of capacity.[1] U.S. Br. 6-8, 9-10, 14, 16, 20, 23, 29-30 & n.13, 37. In so

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[1] All of respondents' flawed arguments seemingly flow from this flawed premise that the statutory test at issue is so plainly correct as to preclude any counterarguments. See Resp. Br. 10 (arguing that CAFRA "confirms" that the detention of property clause "should be read to mean what it says: *i.e.*, that claims concerning the detention of property by any law enforcement officer are exempt from the FTCA's waiver of sovereign immunity"), 37 (arguing that the legislative history evinces no indication "that anyone in the Department of Justice – much less any Member of Congress – thought that the phrase 'any other law enforcement officer,' contrary to its plain meaning, included only law enforcement officers "acting in a customs or tax capacity"), 37

asserting, however, respondents (like the court of appeals below and other courts that have ruled similarly, see Pet. Br. 19-20) have wrestled the phrase from its context and ask this Court to excise fourteen words from the full statute.[2] Such an unmoored reading of legislation, as petitioner's opening brief explains (at 11-13), is antithetical to "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

The related *ejusdem generis* and *noscitur a sociis* canons applied by petitioner in his opening brief (at 13-17) account for § 2680(c)'s contextual cues and dictate that § 2680(c)'s detention clause be given a limited construction that is faithful to its customs- and tax-focused surroundings. Indeed, all five courts of appeals to have considered the canons found that they compel the narrow context-based construction of § 2680(c) offered by petitioner here.[3] Respon-

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("A reading of the detention-of-property exception that reaches all law enforcement officers not only is consistent with the plain language of Section 2680(c), but also furthers Congress's underlying policy objectives.").

[2] The detention clause has twenty-two words. Under respondents' construction, it would effectively have only eight: "detention of * * * property * * * by any * * * law enforcement officer." How that construction is so plainly correct as to preclude any counterargument, as respondents seemingly suggest, is mystifying.

[3] See *ABC v. DEF*, No. 06-1362-cv, --- F.3d ---, 2007 WL 2500738, at *3 (CA2 Sept. 5, 2007); *Andrews v. United States*, 441 F.3d 220, 223-25 (CA4 2006); *Ortloff v. United States*, 335 F.3d 652, 658 (CA7 2003), cert. denied, 540 U.S. 1225 (2004); *Bazuaye v. United States*, 83 F.3d 482, 484 (CADC 1996); *Kurinsky v. United States*, 33 F.3d 594, 596-97 (CA6 1994), cert. denied, 514 U.S. 1082 (1995).

dents' attempt to brush aside the canons and the strong contextual cues to which they give meaning is unavailing.

2. As a threshold matter, respondents assert (at 9-10, 17, 21) that the canons are inapplicable because the detention clause's residual phrase "has a clear meaning" and is "not ambiguous." Critically, however, the Court already acknowledged "the ambiguity as to the reach of the phrase 'any other law enforcement officer'" over twenty years ago when it expressly declined to decide in *Kosak v. United States*, 465 U.S. 848, 852 n. 6 (1984), "what kinds of 'law-enforcement officer[s],' other than customs officials, are covered by the exception." *Ortloff*, 335 F.3d at 657 & n.4 (quoting *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823 (CA2 1985)), cert. denied, 540 U.S. 1225 (2004). It would be absurd to think that this Court would go out of its way to identify the unclear scope of the detention clause's residual phrase – an issue having nothing to do with the question presented in *Kosak* – if the clause was susceptible of only one plausible interpretation.

Moreover, the fact that the phrase "invites at least two plausible interpretations" is clear. *Bazuaye*, 83 F.3d at 483. A significant number of circuits have not only found the phrase ambiguous and applied the canons to interpret it but also interpreted it consistent with the construction offered by petitioner here. All-in-all, five courts of appeals and a total of sixteen circuit judges have interpreted the phrase this way. See note 2, *infra*; see also *Formula One Motors*, 777 F.2d at 825 (Oakes, J., concurring); *A-Mark, Inc. v. Secret Serv.*, 593 F.2d 849, 850-51 (CA9 1978) (Tang, J., concurring). If § 2680(c) is, as respondents suggest, so clear that petitioner's interpretation of it is "profoundly atextual" (at 6), "muscular (and indeed, virtually unprecedented)" (at 23), then sixteen circuit judges not only erred in resolving the question presented but erred grievously.

3. Respondents are also incorrect when they assert (at 17-18) that the canons are "particularly" inapplicable "when the general phrase at issue is introduced with the expansive

term 'any.'" Were that the case, at least two of this Court's recent decisions would have been decided differently. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (applying *ejusdem generis* to limit "*any other* class of workers engaged in foreign or interstate commerce" in § 1 of the Federal Arbitration Act, 9 U.S.C. 1 (emphasis added), to transportation workers); *Guitierrez v. Ada*, 528 U.S. 250, 254-58 (2000) (applying *noscitur a sociis* to limit "*any* election" in § 1422 of the Guam Organic Act, 48 U.S.C. 1422 (emphasis added), to gubernatorial elections).

4. a. Respondents also argue (at 19) that *ejusdem generis* is inapplicable for the additional reason that § 2680(c)'s "any other law enforcement officer" phrase does not "follow[] a list of specific phrases." Under respondents' articulation of the canon, *ejusdem generis* would appear to apply to the detention clause only if Congress had written it to read "any customs officer, any excise officer, or any other law enforcement officer." Notably, however, respondents do not claim that the phrase "any customs officer [or] any excise officer" would have a different meaning than Congress' more concise use of the phrase "any officer of customs or excise." Nonetheless, respondents would seemingly require Congress to use more words notwithstanding that fewer have sufficed to convey the same point. Petitioner is aware of no support for such a proposition. Nor is petitioner aware of any authority for the proposition that a grouping must bear parallel construction to be a "list." Put simply, "any officer of customs or excise or any other law enforcement officer" is no less a list than "any customs officer, any excise officer, or any other law enforcement officer" or the lists to which the Court has applied *ejusdem generis* recently.[4]

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[4] See, *e.g.*, *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382 (2003); *Circuit City Stores*, 532 U.S. at 118.

Respondents are likewise mistaken when they argue (at 20) that *ejusdem generis* should not apply because "petitioner's construction is too narrow." That argument would have persuasive force if, as in *James v. United States*, 127 S. Ct. 1586, 1592 (2007), respondents were able to offer a "mo[re] relevant common attribute" on which to base a reasonable construction of the detention clause.[5] They offer none.

b. Respondents next claim (at 20-21) that *noscitur a sociis* is specifically inapplicable because § 2680(c) contains "weak" contextual cues that Congress intended the detention clause's residual phrase to be limited. Neither the statute's text nor this Court's precedents applying *noscitur a sociis* supports respondents' cramped reading. The detention clause itself contains four cues that Congress had customs and tax officers in mind when it enacted the clause. It reaches the detentions of "goods" and "merchandise," both of which have historically been associated with revenue collection,[6] by officers of "customs" and "excise," "whose job is to enforce the tax and customs laws." *Andrews*, 441 F.3d at 224-25. The assessment clause of the same provision provides four additional cues by reaching the "assessment" or

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[5] Indeed, the folly of respondents' argument is best exemplified by their own hypothetical (at 20). Taking respondents' example, a statute could list "spoons, forks, and any other utensil." In that context, "any other utensil" could have three meanings: (1) any utensil used for eating (e.g., knives and chopsticks); (2) any kitchen utensil (e.g., knives, chopsticks, whisks, and spatulas); or (3) any utensil whatsoever (e.g., kitchen utensils and dental utensils). The same is not true here. The residual phrase of § 2680(c)'s detention clause can have only two possible constructions, and petitioner's is the one more faithful to the text.

[6] See, *e.g.*, Act of July 31, 1789, § 22, 1 Stat. 42 (if an importer, "with design to defraud the revenue," did not invoice his goods at their actual cost at the place of export, "all such goods, wares or merchandise, or the value thereof * * * shall be forfeited").

"collection" of any "tax" or "customs duty," the specific actions of customs and tax officers.

This Court, as petitioner's opening brief explains (at 15-17), has repeatedly applied *noscitur a sociis* to such cues to avoid giving superficially broad language (like the detention clause's residual "any other law enforcement officer" phrase) "unintended breadth." *E.g.*, *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see also *Gutierrez*, 528 U.S. at 254-55, 257. Notwithstanding that petitioner discussed *Dolan*, *Jarecki*, and *Gutierrez* at length in his opening brief – and that the Court in *Dolan* applied *noscitur a sociis* to another FTCA exception (§ 2680(b)) just two Terms ago – respondents do not so much as cite *Dolan* or *Jarecki*. While respondents do discuss *Gutierrez* and attempt to distinguish it (at 22-23) from this case, their efforts fall short.

Not only do respondents fail to mention in their comparison of this case with *Gutierrez* the strong contextual cues in the detention clause itself, they criticize (at 22, 23) petitioner for relying on the cues contained in the assessment clause that, they claim, is in "another portion of the statute" and not directly "implicated in this case." The premise of that criticism is flatly misplaced. The assessment clause does not appear "in another portion of the statute;" it appears in the very same subsection – and was enacted at the same time – as the statutory language in dispute. In light of this Court's stated commitment to not read disputed language "in isolation," but instead on a "reading of the whole statutory text," those cues are not only relevant but compel the narrow construction offered by petitioner. *Dolan*, 546 U.S. at 486.

5. As petitioner's opening brief further demonstrates, the court of appeals' construction would render the detention clause's residual phrase inoperative because "[c]ustoms and tax officers, who are indisputably law enforcement officers, would be subsumed by the broader category of 'other law enforcement officer[s].'" Pet. Br. 17-18 (citing *Ortloff*,

335 F.3d at 659; *Bazuaye*, 83 F.3d at 484 (footnote omitted)); see also *ABC*, 2007 WL 2500738 at *3. Respondents' rejoinder (at 24) that "[c]ustoms or excise officers would be covered by [the 'any officer of customs or excise] phrase, not the successive (and mutually exclusive) phrase 'any other law enforcement officer'" has already been rejected by this Court. See *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 78-79 (1990).[7]

Respondents fare no better when they assert (at 24) that petitioner's reading would "seemingly render the phrase "any other law enforcement officer" entirely, or almost entirely superfluous" because "it is far from clear" when officers other than customs or tax officers "are 'acting in a customs or tax capacity.'" In addition to the examples cited by petitioner in his opening brief (at 18-19 & n.12), the law reporters are littered with cases in which officers other than customs or tax officers detain property while acting to enforce customs or tax laws.[8]

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[7] In *Arcadia*, the Court was asked whether certain Federal Energy Regulatory Commission and Securities and Exchange Commission orders imposed requirements sufficient to trigger the conflict preemption provision of § 318 of the Federal Power Act. For § 318 to apply, the administrative requirement must have been imposed "with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." 16 U.S.C. 825q (2004) (emphasis added). The court of appeals interpreted the statute broadly "in effect adding to [its] detailed list 'or anything else.'" 498 U.S. at 78. This Court sensibly rejected that construction because it "render[ed] the proceeding enumeration of specific subjects entirely superfluous." *Ibid.*

[8] *United States v. Gurr*, 471 F.3d 144 (CADC 2006) (FBI's detention of financial documents seized by Customs agent during border search); *United States v. Long*, 108 F.3d 1377, 1997 WL 130079 (Table) (CA6 1997) (detention of video tapes by postal inspectors on suspicion of receiving imported obscene material); *Evans v. McKay*, 869

Far from rendering any of § 2680(c) superfluous, petitioner's construction of the statute not only gives full effect to all of its language but ensures that Congress' unmistakable focus on revenue collection is honored.

II. NEITHER THE CIVIL FORFEITURE-FOCUSED AMENDMENTS TO § 2680(C) IN 2000 NOR THEIR LEGISLATIVE HISTORY SUPPORTS RESPONDENTS' EXPANSIVE READING OF THE STATUTE'S DETENTION CLAUSE

1. As petitioner explained in his opening brief (at 46-49), Congress' enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, and addition of a civil forfeiture-focused "exception to the exception" at the end of § 2680(c) is irrelevant to this case. Petitioner's claim does not arise under the new CAFRA clause, as respondents acknowledge (at 22). And because, as respondents seemingly concede (at 11 n.4), CAFRA did not change in any meaningful way the language of the detention clause under which the court of appeals dismissed petitioner's claim, the Act's reforms have no bearing on this case.

Nonetheless, respondents argue (at 13-14) that "CAFRA confirms that the FTCA's detention-of-property exception was intended to reach *all* law enforcement officers,

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F.2d 1341 (CA9 1989) (seizure of supply of tax-free cigarettes by law enforcement officers of the Bureau of Indian Affairs because possessed by non-Indian); *United States v. 2,200 Paper Back Books*, 565 F.2d 566 (CA9 1977) (seizure of books by United States Marshal for violation of statute prohibiting importation of obscene material); *Taylor v. United States*, 550 F.3d 983 (CA4 1977) (seizure of hashish on merchant vessel by customs officer and DEA agents); *Cancino v. United States*, 196 Ct. Cl. 568 (1971) (local police officer's seizure of currency to satisfy federal tax lien); *United States v. Riley*, 85 F. Supp. 533 (E.D. Pa. 1949) (local police officers' seizure an unregistered still and a quantity of tax unpaid whiskey); *Appeal of Hughes*, 1 B.T.A. 944 (1925) (local police officers' seizure of taxpayer's private stock of liquors for failure to pay taxes).

not merely those 'acting in a customs or tax capacity.'" That is simply not the case, as all three courts of appeals to have considered the CAFRA amendments have held. See *ABC*, 2007 WL 2500738, at *4-*5; *Dahler v. United States*, 473 F.3d 769, 772 (CA7 2007) (*per curiam*); *Andrews*, 441 F.3d at 226-27.

"CAFRA merely ensures that § 2680(c) does not foreclose claims related to property that has been seized for forfeiture in the enumerated circumstances." *Dahler*, 473 F.3d at 772. Respondents assert (at 11) that one such requirement – that the "property was seized for the purpose of forfeiture under *any* provision of Federal law providing for the forfeiture of property" – demonstrates Congress' understanding that the phrase "any other law enforcement officer" is broad. 28 U.S.C. 2680(c)(1). That is true, however, "only if one makes the invalid assumption that officers acting in a customs or excise capacity can effect forfeitures only under the customs or excise laws." *ABC*, 2007 WL 2500738 at *5. Although respondents assert (at 12) that "[c]ustoms and internal revenue officers do not pursue forfeitures under the vast majority of civil forfeiture statutes," they noticeably do not go so far as to suggest that customs and revenue officers pursue forfeitures *only* under the customs or revenue laws.

All-in-all, "[t]he text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) to initially apply and thus immunize the government from suit." *Dahler*, 473 F.3d at 772. The resolution of that issue, therefore, depends exclusively on the detention clause's text and the intentions of the Congress that enacted it in 1946. The text of CAFRA itself confirms this.

2. Far from broadening the reach of the detention clause, CAFRA affirmatively replicated the detention clause's language when it also required as a prerequisite to a CAFRA claim that the subject property must have been "in the possession of any officer of customs or excise or any other law enforcement officer" when damaged or lost. 28

U.S.C. 2680(c). It would have been easy for Congress to broaden the scope of the detention clause had it wanted, but it affirmatively declined that opportunity. See H.R. 1745, 105th Cong., 1st Sess. § 106 (1997). That inaction,[9] coupled with Congress' preservation and replication of the detention clause's language, is conclusive evidence that Congress intended to adopt the detention clause's original meaning and carry it forward. The proper construction of the detention clause, therefore, must be based on its text and the understanding of the Congress that enacted it in 1946. Nothing that certain members of Congress may have expressed over fifty years later during CAFRA's drafting is at all relevant – a treatment that accords with the Court's oft-repeated admonitions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)), and that "it is the intent of the Congress that enacted [the language in dispute] that controls," *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.9 (1977).

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[9] Respondents criticize (at 29 n. 13) petitioner for relying in his opening brief (at 47 n.42) on this congressional inaction. That criticism, however, is misplaced. This Court has "relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise issue*' presented before the Court." *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (emphasis in original; internal quotation marks omitted); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("Nonaction by Congress is not often a useful guide, but the nonaction here is significant."). Congress considered the "precise issue" before this Court in this case – *viz.*, whether § 2680(c)'s detention clause should be broadly bar claims arising out of the detentions of property by all law enforcement officers – when it took up H.R. 1745. The fact that it rejected H.R. 1745 demonstrates its intent to permit courts to continue to construe the detention clause narrowly.

III. NOTHING IN THE LEGISLATIVE HISTORY OF § 2680(C) SUPPORTS RESPONDENTS' EXPANSIVE READING OF THE PROVISION

1. As detailed in petitioner's opening brief (at 25-32), the legislative history of § 2680(c) confirms that neither Congress nor the Department of Justice official who drafted the provision's detention of property clause intended the clause to preclude government liability for property torts committed by law enforcement officers acting outside the customs and tax contexts. In fact, respondents concede (at 31, 35) that every description of § 2680(c) offered by Congress (both before and after § 2680(c) was expanded to include the detention of property clause) referred to the provision as dealing solely with customs and tax enforcement functions. Notwithstanding this overwhelming evidence of legislative understanding, respondents boldly suggest (at 31) that § 2680(c)'s legislative history actually supports their interpretation of the statute. That suggestion does not withstand scrutiny.

2. The only evidence on which respondents rely affirmatively (at 32) for their assertion that the legislative history supports their construction is the explanatory report that then-Special Assistant to the Attorney General (and later District Judge) Alexander Holtzoff included with a draft tort claim bill that he authored in 1931.[10] In that report, Judge Holtzoff explained that he "expanded the [previous customs and tax] exception to include immunity from liability in respect of loss in connection with the detention of goods or merchandise by an officer of customs or excise." Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) [hereinafter "Holtzoff Report"]. No-

[10] The parties agree (Pet. Br. 27; Resp. Br. 31-32 & n.14) that what is now § 2680(c)'s detention of property clause was "almost certainly" drafted by Judge Holtzoff and that his views of the clause's proper scope are relevant to the Court's resolution of the question presented.

where in that sentence of – or anywhere else in – the report did he indicate that he intended to "include immunity" in connection with the detention of goods by law enforcement officers beyond the customs and tax contexts.

Notwithstanding that conspicuous omission, respondents argue (at 33) that the report indicates that Judge Holtzoff was of the "view that all law enforcement officers would by covered by the detention of property exception, regardless whether they were 'acting in a customs or tax capacity.'" They base this argument on the next sentence of Judge Holtzoff's report, in which he observed that the detention of property clause "has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like." *Ibid.* Respondents offer no explanation, however, for why, if their reading of Judge Holtzoff's report is correct, he would state expressly that his bill would include immunity for "officer[s] of customs or excise" but not "law enforcement officals." Perhaps it is because the better view, as expressed by petitioner in his opening brief (at 29), is that Judge Holtzoff's reference to "law enforcement officials, internal revenue officers, and the like" immediately following his reference to "appraisers' warehouses or customs houses" indicates his understanding that immunity would turn on whether "law enforcement officials, internal revenue officials, and the like" were engaged in revenue collection or, instead, ordinary law enforcement activities.[11]

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[11] Respondents' additional suggestion (at 34 n.15) that Judge Holtzoff intended § 2680(c) to "preserv[e] the federal government's immunity against" "prisoner claims for property damage" is baseless. Respondents correctly explain that "in his report, Judge Holtzoff noted that the New York Attorney General had informed him that, under that State's tort statute, 'claims for damages by prison inmates ha[d] been on the increase'" but "that '[t]his source of liability [was] expressly eliminated by [his] proposed [federal tort claim] bill.'"

IV. RESPONDENTS' EXPANSIVE READING OF § 2680(C) IS AT ODDS WITH THE CONGRESSIONAL PURPOSE BEHIND THE PROVISION

1. Petitioner's opening brief demonstrates (at 33-45) that Congress could not have intended to bar claims arising out of detentions of property by all law enforcement officers regardless of their capacity because such a bar would be inconsistent with the congressional purpose behind § 2680(c). As the Court has repeatedly suggested and the FTCA's legislative history confirms, Congress' sole purpose for enacting § 2680(c) was to prevent the FTCA from creating a redundant federally funded remedy for the negligent acts of revenue collectors.[12] On all three occasions that the Court has referenced Congress' purpose for enacting § 2680(c), it has cited only the avoidance of creating a duplicative remedy. *See Kosak*, 465 U.S. at 858 & n.17; *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 n.5 (1995); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 n.4 (1980) (*per curiam*). Likewise, on all four occasions before Congress expanded the provision to cover detentions of property, Congress cited only the avoidance of creating a duplicative remedy as a purpose. See Pet. Br. 36-37. Perhaps more importantly, on both occasions in which the individuals responsible for ex-

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Resp. Br. 34 n.15 (quoting Holtzoff Report, *supra*, at 14). They then suggest that it was the detention of property clause that "expressly eliminated" "this source of liability." In doing so, however, they fail to acknowledge that Judge Holtzoff's draft bill proposed an exception that would bar "[a]ny claim for injury to, or death of a prisoner," Alexander Holtzoff, Proposed Federal Tort Claims Bill § 4(12) (1931); see also H.R. 5065, 72d Cong., 1st Sess. § 206(11) (1931) (same), and as respondents elsewhere acknowledge (at 44 n.22), all pre-FTCA requests by prisoners for private claim legislation "involved claims for personal injury, rather than claims for property damage."

[12] Respondents seemingly concede (at 38) that an FTCA exception need only be supported by one congressional purpose.

panding the provision (Judge Holtzoff and Col. O.R. McGuire) testified as to the purpose of the expanded provision, they cited the same purpose as well. See *id.* at 37-38.[13]

2. Respondents are unwilling to concede that preventing the FTCA from creating a redundant federally funded remedy for the negligent acts of revenue collectors was the sole purpose behind § 2680(c). This comes as no surprise, however, because admission of this purpose would be fatal to respondents' position. After all, respondents admit (at 41-42) that at the time of the FTCA's enactment, there was no risk of duplicating remedies payable by the federal fisc for the tortious conduct of law enforcement officers acting outside the customs and tax contexts.[14] Respondents' position, though unsurprising, is untenable. It is unquestionably foreclosed by this Court's prior decisions.

Respondents assert (at 42) that "*Kosak* itself * * * belies th[e] contention" that Congress' only relevant purpose for enacting § 2680(c) was to avoid duplication of remedies. A faithful reading of *Kosak*, however, proves just the opposite. There, the Court observed that the "only arguably relevant specific statement as to the purpose of § 2680(c)" was Judge Holtzoff's testimony emphasizing "the adequacy of existing

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[13] Notably, respondents cite no evidence from the legislative record of a contrary purpose for § 2680(c).

[14] Respondents suggest (at 40-42) that their construction is consistent with Congress' desire to avoid duplication of a preexisting remedy because, at common law, officers other than customs and tax officers "could potentially be held liable for damages to detained property on a theory of negligence * * * * in their individual capacities." There is no merit to that suggestion. Congress' stated desire to avoid remedy redundancy concerned duplication of *federally funded* (and non-discretionary) preexisting remedies. See *Dolan*, 546 U.S. at 491 (rejecting the government's argument that an FTCA remedy would be duplicative of federally funded administrative remedies "permit[ting] only discretionary relief").

remedies." 465 U.S. at 858 n.17.[15] The Court then found that its reading of § 2680(c) was consistent with that purpose. *Id.* at 860-61. To be sure, the Court considered the other two "general purposes" underlying Congress' enactment of the § 2680 exceptions, but it did so, as petitioner's opening brief explains (at 38 n. 35, 43-44 n.38), "merely to ensure that [its] construction [was] not undercut by any indication that Congress meant the exception" to be applied differently, not because each underlying purpose must apply to each exception – much less, § 2680(c). *Id.* at 858 n.16; see also Pet Br. 35-36 n.30 (detailing how Congress considered its three "general purposes" behind the § 2680 exceptions to be disjunctive). Respondents have offered nothing persuasive to undercut this reading of *Kosak*.

Nor are respondents correct (at 43 n.21) that "[t]he other cases cited by petitioner" – *Gutierrez de Martinez* and *Hatzlachh* – "do not support the proposition that Section 2680(c) was solely intended to avoid duplicative remedies." For example, the Court could hardly have been clearer in *Hatzlachh* in its recognition of the singular purpose behind § 2680(c). There, the Court observed that certain "exemptions, such as the assessment or collection of taxes or customs duties [and] *the detention of goods by customs officers* * * * were included because various other laws provided the machinery for recovery on these claims. * * * The purpose was to avoid duplication." 444 U.S. at 462 n.4 (emphasis added). Likewise, in *Gutierrez*, 515 U.S. at 427 n.5, the Court explained that "[s]everal of the FTCA's 13 exceptions are for cases in which other compensatory regimes afford relief" and then cited, among other exceptions, § 2680(c). The Court never stated, as respondents suggest (at 43 n.21),

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[15] The parties in *Kosak* did not present the Court with many of the other statements in the legislative record and by contemporary commentators that the purpose behind § 2680(c) was the avoidance of duplication. See Pet. Br. 36-38 & n.31.

that it was referring to only § 2680(c)'s assessment *clause*. To the contrary, the Court referred to the "*exception*[]." *Ibid.* (emphasis added). Because Congress' sole purpose for enacting § 2680(c) was to avoid creation of a redundant remedy, respondents' focus (at 38-39) on Congress' other two "general purposes" is a non-starter.

3. Respondents' reliance on Congress' other two general purposes – "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits" and "avoiding exposure of the United States to liability for excessive or fraudulent claims," *Kosak*, 465 U.S. at 858 & n.17 – proves too much and risks precisely the sort of "'unduly generous interpretation[]'" that would "'defeat the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language,'" *Dolan*, 546 U.S. at 492 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

To be sure, the administration of federal prisons and other federal law enforcement functions are important, but the same is true of every governmental function. For example, the functions of the Postal Service, with its 600 million daily mailings and 142 million delivery points, could be said to be sufficiently important so as to warrant sweeping insulation from private lawsuits. See *id.* at 488. The Court has been careful, however, not to read § 2680 exceptions broadly merely because governmental functions are important. A similarly measured approach is warranted in this case to avoid "swallow[ing] up Congress' waiver of immunity, given the potential number of federal law enforcement officials in our modern government's alphabet soup – *i.e.*, the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few." *Ortloff*, 335 F.3d at 659.

The Court's decision in *Dolan* just two Terms ago is instructive. Stressing the importance of the Postal Service's functions, the government in that case asked the Court to construe the term "negligent transmission" in § 2680(b) in a sufficiently broad manner so as to bar the plaintiff's claim for slip-and-fall injuries resulting from a negligently placed par-

cel. 546 U.S. at 489. In rejecting the government's arguments regarding how Congress' other two "general purposes" for the § 2680 exceptions would be best served by a broad construction of § 2680(b), the Court observed that "[s]lip-and-fall liability * * * is a risk shared by any business that makes home deliveries." *Id.* at 491. Law enforcement officers who obtain private property – through seizure or otherwise – as respondents acknowledge (at 41), are bailees. Liability for the loss of or damage to a bailor's property is a risk properly shared by all bailees – particularly, the federal prison officials in this case whose bailment was not the product of a seizure.

4. Finally, even if Congress' other two general purposes were somehow relevant to the Court's resolution of this case, petitioner's narrow context-based construction of § 2680(c) is consistent with such objectives. See Pet. Br. 43-44 n.38. Respondents offer no rejoinder whatsoever to petitioner's articulation of how his construction shields the federal government's "life-blood" revenue collection functions, *Bull v. United States*, 295 U.S. 247, 259 (1935), from "disrupt[ion] by the threat of damage suits" and "exposure * * * for excessive or fraudulent claims" – both of which they certainly would have faced had § 2680(c) never been enacted. *Kosak*, 465 U.S. at 858-59.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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